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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Access Charge Reform)	CC Docket No. 92-262
)	
Price Cap Performance Review)	CC Docket No. 94-1
for Local Exchange Carriers)	
)	
Amendment of the Commission's Rules:)	
Regulatory Access Charge Reform and)	RM 9210
Price Cap Performance Review for)	
Local Exchange Carriers)	

Comments of
Excel Telecommunications, Inc.
In Support of Prescriptive Action to
Establish Cost-Based Access Charges

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October 26, 1998

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Excel Telecommunications, Inc. ("Excel") on behalf of its operating subsidiaries, by undersigned counsel and pursuant to the Federal Communications Commission's ("Commission") Public Notice released October 5, 1998,^{1/} hereby submits its Comments in the above-captioned proceedings.

^{1/} *Commission asks Parties to Update and Refresh Record for Access Charge Reform and Seeks Comment on Proposals for Access Charge Reform Pricing Flexibility*, Public Notice, FCC 98-256 ("Public Notice") (rel. Oct. 5, 1998).

Introduction and Background

In its *Access Reform*^{2/} and *Price Cap Orders*^{3/}, the Commission adopted a market-based approach to reducing access charges to cost-based rates and increased the X-Factor to reflect increased ILEC productivity. While the X-Factor increase resulted in minor access charge rate reductions, the Commission clearly acknowledged that access charge rates remained at substantially above-cost levels.^{4/}

In its Public Notice, the Commission requests comments from parties to update and refresh its record on access charge reform. The Commission requests that parties address three specific issues in their comments:

- (1) Proposals that the X-Factor should be adjusted upward or downward;
- (2) Additional pricing flexibility proposals made by Bell Atlantic and Ameritech; and
- (3) Petitions for prescription of interstate access rates to cost-based levels filed by MCI and the Consumer Federation of America et al.

^{2/} *Access Charge Reform*, CC Docket No. 96-262 *et al.*, First Report and Order, 12 FCC Rcd 15982 (1997) (*Access Reform Order*), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 520 (8th Cir. 1998), Order on Reconsideration, 12 FCC Rcd 10119 (1997), Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16606 (1997). Petitions for reconsideration are pending before the Commission.

^{3/} *Price Cap Performance Review for Local Exchange Carriers, Access Charge Reform*, Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, 12 FCC Rcd 16642 (1997) (*Price Cap Order*).

^{4/} See, e.g., *Access Reform Order* at ¶44 (prescriptive measures are "first step" to moving charges toward economically efficient levels).

In these comments, Excel focuses on the Commission's request for comment on issues one and three. Excel urges the Commission to prescribe cost-based interstate access rates for price cap LECs. In the alternative, if the Commission refuses to prescribe cost-based rates, it should at least increase the X-Factor to reflect higher levels of ILEC productivity. Excel does not in these initial comments specifically address pricing flexibility for ILECs, other than to affirm the obvious: that pricing flexibility should not be granted in any way unless and until ILECs can make a convincing showing that significant competition exists across a variety of services.^{5/}

Excel is the fourth largest interexchange carrier in the United States, and is one of the fastest growing providers of telecommunications services in the country. Through resale and increasingly through use of its own facilities, Excel offers residential and business telephone, international service, paging, 800 service and calling cards to customers in all 50 states and the District of Columbia. While Excel currently offers predominantly interexchange service, it is also pursuing the provision of competitive local exchange services. Excel's wholly-owned subsidiaries are currently authorized to provide competitive local exchange service in over 30 states, and soon will be authorized in all 50. Excel provides service to more than 6 million customers, the substantial majority of whom are residential consumers. Accordingly, Excel has been and will continue to be profoundly affected by the Commission's revisions to the interstate access charge regime.

On February 24, 1998, MCI petitioned the Commission for emergency prescription of access rates to cost-based levels. In its petition, MCI also asked the Commission to prescribe key terms and

^{5/} Excel reserves the right to respond to other parties' comments on this issue.

conditions in its then-pending investigation of price cap LEC access tariff filings. Specifically, MCI asked the Commission to:

- Require ILECs to identify on access charge bills to IXCs the portion of such charges that represents ILEC contributions to universal service;
- Hold ILECs responsible for collection of the PICC until they can provide all necessary information to IXCs in advance of billing;
- Prescribe a standardized, independently verifiable definition of primary and non-primary lines;
- Require the ILECs to provide auditable line count information by telephone number;
- Prescribe language that enables IXCs to notify ILECs of de-PICs and requires ILECs to stop assessing the PICC on that IXC for the de-PIC'd line; and
- Standardize the date used by ILECs to decide which lines are assigned to a particular IXC for assessment of PICCs.

Although the Commission addressed one of the issues raised by MCI's petition (procedures for IXC notification of de-PICs to ILECs),^{6/} it has failed to act on the remaining issues, which are equally, if not more, important than the one issue the Commission chose to address. While Excel continues to support all of MCI's requests for relief, in these comments Excel focuses solely on what it believes is the core issue – reducing access charges to cost-based rates immediately.

^{6/} *MCI Emergency Petition for Prescription*, CC Docket No. 97-250, CCB/CPD No. 98-12, Memorandum Opinion and Order, 13 FCC Rcd 11127 (Com. Carr. Bur. 1998).

I. The Commission Has the Authority to Prescribe Forward-Looking Cost-Based Rates and Should Exercise that Authority Immediately

Congress has given the Commission "broad discretion in selecting methods ... to make and oversee rates." *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 547 (8th Cir. 1998) (citations omitted). Although the Eighth Circuit deferred to the Commission's "predictive judgment" that competition in the local telephone market "will effectively drive interstate access charges to economic costs," it also recognized that the Commission retained the authority to alter its conclusion in light of actual market developments:

If, in light of actual market developments, the Commission determines that competition is not having the anticipated effect on access charges, the agency presumably will revisit this issue.^{7/}

As Excel shows below, competition is not having the effect on access charges that the Commission anticipated when it adopted the *Access Reform Order*. Market forces simply are not applying downward pressure on ILEC access charges. Moreover, it is clear that if ILECs ever do reduce their access rates because of market pressures, they will come clamoring to the Commission claiming that the lost revenue was a subsidy that must be replaced by universal service support.^{8/} In order to forestall such claims, the Commission must make clear that current access rates are

^{7/} *Id.*

^{8/} See, e.g., *Proposal of GTE [to Revise the Methodology for Determining Universal Service Support]*, CC Docket No. 96-45 (filed April 27, 1998) ("the explicit funding mechanisms of the Federal plan must first recover the subsidies that will be lost as competition depresses access charges to market levels").

above-cost and that the excess revenues above cost are not implicit subsidies that support universal service.

A. Above-Cost Access Charges Hurt Consumers and Impede the Development of Competition

As Excel argued in its Comments in RM 9210, the Commission should prescribe access charges for ILECs at cost-based rates. When the Commission adopted its current rules reforming the ILEC access charge regime, it specifically found that ILEC access charges contain hidden subsidies and are set at levels grossly in excess of economic costs.^{9/} As the Commission has previously noted, implementation of Section 251 of the 1996 Act^{10/} is integrally related to reform of the interstate access charge system, and, in order to achieve pro-competitive, deregulatory markets for all telecommunications services, access charges must be moved to more cost-based and economically efficient levels:

It is widely recognized that, because a competitive market drives prices to cost, a system of charges which include non-cost based components is inherently unstable and unsustainable.^{11/}

In its *Access Reform Order*, the Commission found that above-cost access charges impose unnecessarily high costs on consumers and impede the growth of competition for local services, and concluded that these rates must be driven down to levels that reflect economic cost. The Commission

^{9/} *Access Reform Order* at ¶30.

^{10/} *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

^{11/} *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶8 (1996) ("*Local Competition Order*"). See also *Id.* at ¶716.

adopted a market-based approach that relied heavily on the unfettered availability of unbundled ILEC network elements as the mechanism to achieve such rate reform.^{12/}

B. Because Competition in Local Exchange Markets Has Not Developed As Swiftly As Expected, Market Forces Are Not Pushing Access Rates Down

Unfortunately, given the slow introduction of competition to the local markets, competitive pressures cannot be relied upon to protect consumers and the public interest. Figures released by the Commission show that CLECs served fewer than 160,000 access lines through unbundled local loops in the territories of nine large ILECs in 1997.^{13/} Furthermore, information gathered by the Commission shows that as of December 31, 1997, no competitor was utilizing unbundled loops in 16 states and competitors were using fewer than 100 unbundled loops in 12 states.^{14/}

A report by New Paradigm Resources Group, Inc. ("NPRG") presents a rosier scenario, estimating that CLECs served a total of 1,846,531 access lines in 1997.^{15/} By contrast, ILECs served 169,186,621 access lines a year earlier in 1996, before substantial growth in access lines in 1997.^{16/} Importantly, only facilities-based CLECs that use either their own facilities or a combination of their own facilities and unbundled network elements place market pressure on ILEC access charges and

^{12/} *Access Reform Order* at ¶263.

^{13/} Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, *Trends in Telephone Service*, Table 8.4 (July 1998).

^{14/} *Id.*

^{15/} *1998 CLEC Report*, New Paradigm Resources Group, Inc., Chp. 2 at 17 (1998).

^{16/} *Id.*, Chp. 4 at 9.

only in a very discrete number of urban areas. This is because the ILEC is still entitled to collect access charge from IXCs originating or terminating calls from or to customers of CLECs that merely resell the ILEC's local exchange service.^{17/}

While predicting continued strong CLEC revenue growth, the *1998 CLEC Report* recognized that local competition has not met the expectations generated by the 1996 Act:

After the enactment of the Telecommunications Act of 1996, there was a heightened expectation among industry pundits that the local markets would open in rapid fashion. Unfortunately, these expectations were not realized for various reasons. For instance, local number portability is still not a reality and resale rates established by regulators appear insufficient to provide the type of incentive necessary to entice new providers to enter the local market. Additionally, it is taking longer than initially expected to work out the kinks for CLECs to gain efficient access to unbundled local loops as well as to develop effective OSS interfaces for CLECs and ILECs to work together seamlessly as part of the public switched network.^{18/}

An additional reason local competition expectations have not been met is the uncertainty caused by the Eighth Circuit Court of Appeals decision. This decision effectively eliminated CLECs' ability to use unbundled network elements to provide local service by vacating rules that required ILECs to combine UNEs and rules that prohibited ILECs from disassembling UNEs that were currently combined in the ILEC's network^{19/} The impact of this decision -- especially on

^{17/} *Local Competition Order* at ¶1980-84 (ILECs may collect all access charges from IXCs except for SLCs which ILECs may collect from CLEC reselling local service).

^{18/} *1998 CLEC Report*, Chp. 1 at 2.

^{19/} *Iowa Utils. Bd. v. FCC*, 120 F.2d 753, 815 (8th Cir. 1997), as amended by Order on Rehearing filed October 14, 1997, *cert. granted sub nom., AT&T Corp. v. Iowa Utils. Bd.*, 118 S. Ct. 879 (1998) ("*Iowa Utils. Bd.*").

residential service markets -- cannot be overstated. As the Commission aptly stated in its Motion to Expedite Consideration of the Petition for Certiorari before the United States Supreme Court:

by invalidating Rule 315(b) [which bars ILECs from pulling apart previously joined elements of their telephone networks for the sole purpose of inflicting anti-competitive costs on the new entrants who request access to those elements], the [Eighth Circuit] ***drained the core of the 1996 Act*** -- the statutory right of new entrants to gain "unbundled access" to an incumbent LEC's network elements, 47 U.S.C. 251(c)(3) -- ***of its intended competitive effects***. As our [the FCC's] petition explains, the practical consequences of that holding are likely to be at least as significant, and at least as inimical to the competition that Congress sought to create, as the [Eighth Circuit's] erroneous limitation of the [Federal Communications] Commission's regulatory jurisdiction.

We [the FCC] agree with private petitioners that the court of appeals' rulings on those issues are largely responsible for the ***virtual absence of competition in local telephone markets*** ... the disposition of these petitions for certiorari carries the potential for either breaking or ***leaving intact the incumbents' monopolistic grip on local markets***.^{20/}

Even now, more than two years after enactment of the 1996 Act and fully one year after *Iowa Utils. Bd.*, the preconditions necessary to the market-based approach chosen by the Commission to affect access charge reform are absent. To date, the Commission has denied every Bell Operating Company ("BOC") request for Section 271 authority to enter the interLATA market. In Section 271, Congress set forth the key measurement used to determine whether or not ILECs had opened their local exchange markets to competition. In the Commission's most recent investigation of a BOC's compliance with the Section 271 checklist, the Commission found that:

^{20/} Motion to Expedite Consideration of the Petition for Certiorari by the United States and the Federal Communications Commission, *FCC v. Iowa Utils. Bd.*, No. 97-831 (U.S.) (filed Dec. 1997) (citations omitted, emphasis added).

With respect to the third category, we have identified one remaining checklist item where major compliance problems still exist: checklist item (ii) – nondiscriminatory access to network elements. ... More specifically, we conclude that BellSouth's application is deficient with regard to nondiscriminatory access to unbundled network elements because BellSouth offers collocation as the only method for competitive LECs to combine unbundled network elements. ... [W]e conclude that BellSouth fails to demonstrate that, as a legal and practical matter, it can make available access to unbundled network elements through collocation in a manner that allows new entrants to combine network elements and provide competitive service on a widespread basis.^{21/}

The Commission has already established a backstop to bring access rates into line with forward-looking costs where competition has not emerged. The Commission determined it would require price cap LECs to submit forward-looking cost studies of their services no later than February 8, 2001, or sooner "if we determine that competition is not developing sufficiently for the market-based approach to work."^{22/} As shown above, it is clear that such a determination is warranted immediately. Given the "virtual absence of competition in local telephone markets," the Commission must take prescriptive action to set ILEC access charges at cost-based levels.

C. In the Absence of a TSLRIC Study, the Commission Should Prescribe Access Rates that Equal the Cost-Based Rates State Commissions Have Adopted for Transport and Termination of Local Telecommunications

As the Commission has recognized, whether an ILEC is terminating local traffic handed-off by a CLEC or terminating interexchange traffic handed-off by an IXC, the ILEC is using the same

^{21/} *Application of BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271, ¶¶10, 167 (rel. Oct. 13, 1998).

^{22/} *Access Reform Order* at ¶48.

network functions to complete the call.^{23/} Although the Commission determined that the Act preserves the *legal* distinction between charges for transport and termination of local traffic (governed by Sections 251(b)(5) and 252(d)(2)) and interstate and intrastate charges for terminating long distance traffic (governed by Sections 201 and 202), it predicted that the two separate rate schemes would ultimately converge to produce the same rates.^{24/}

A comparison of price cap LEC access charges and permanent rates set by state commissions for the transport and termination of local telecommunications starkly exposes the current disparity between the two rate structures. A comparison of state commission cost-based rates for transport and termination of local telecommunications with interstate access rates clearly shows that interstate access rates remain grossly inflated above cost. For instance, the Texas Public Utility Commission set local traffic termination rates for Southwestern Bell Telephone Company ("SWBT") that range from \$0.002823 to \$0.002887 per minute of use ("MOU") depending on the zone where the traffic is terminated.^{25/} In contrast, the interstate access rates for SBC (SWBT's parent company), average \$0.01285 per MOU for one leg (origination or termination) of an interstate long distance call, or 4.5

^{23/} *Local Competition Order* at ¶1033 ("We recognize that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions").

^{24/} *Id.*

^{25/} *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops*, Docket Nos. 16189 et al., Arbitration Award, Appendix B (Tex. P.U.C. 1997). The total termination rates were derived by adding the per MOU prices for intercompany terminating compensation for local traffic tandem switching (\$0.000794), blended transport (\$0.000399), common transport termination (\$0.00123 to \$0.000187), and end office switching (\$0.001507).

times the cost-based rate.^{26/} Similarly, the Pennsylvania Public Utilities Commission set the rate for Bell Atlantic's termination of traffic delivered at the tandem or local service wire center at \$0.002902 per MOU^{27/} while Bell Atlantic's average interstate access rate is \$0.018825, which is 6.5 times the cost-based rate.^{28/}

One of the reasons the Commission gave for refusing to adopt the prescriptive approach was that accurate forward-looking cost models were not available.

Because of the existence of significant joint and common costs, the development of reliable cost models may take a year or more to complete.^{29/}

In acknowledging the Commission's justification, the Eighth Circuit noted that it was an

adequate, although perhaps not compelling, justification for its refusal to set prescriptive rates for interstate access service. Given our deferential standard of review, this is all that is required.^{30/}

Given the current state of competition in the local exchange market and its failure to place downward pressure on ILEC access charges, the Commission's reluctance to spend one year developing a

^{26/} *Trends in Telephone Service*, Table 1.4. This rate was derived by dividing the total charge per conversation minute (which includes charges on both the originating and terminating end of the call) by two.

^{27/} See, Bell Atlantic-Pennsylvania tariff filing in compliance with Commission Orders in Dockets P-00961137, A-310203F0002, A-310213F0002, A-310236F002, A-310258F002, and R-00973942, Pa. P.U.C. No. 216 Second Revise Sheet 12 and Exhibit A (filed Aug. 19, 1997).

^{28/} *Trends in Telephone Service*, Table 1.4. Again, this rate was derived by dividing the total charge per conversation minute (which includes charges on both the originating and terminating end of the call) by two.

^{29/} *Access Reform Order* at ¶45.

^{30/} *Southwestern Bell*, 153 F.3d at 547.

TSLRIC model to prescribe rates is no longer even an "adequate" reason to reject the prescription option.

The Commission has spent over one year evaluating and developing a forward-looking cost model for universal service purposes, a model which it finally adopted on October 22, 1998. Although the inputs to this model have not yet been chosen, the Commission will soon choose those inputs and use the model to determine levels of high cost support eligible telecommunications carriers may receive for serving rural and high cost areas beginning July 1, 1999. This experience will most certainly provide the Commission with a significant head start in developing a TSLRIC model to set access charges.

The Commission should require ILECs to submit forward-looking cost studies for their access services with their December 1998 access filings. While the Commission is reviewing such filings, it should require ILECs to conform their access rates to comparable rates adopted by state commissions for the transport and termination of local telecommunications traffic.

II. If the Commission Does Not Prescribe Cost-Based Rates, It Must Increase the X-Factor

The Commission did adopt some prescriptive measures (*e.g.*, the increased productivity factor) to reduce access charges immediately.^{31/} As many parties have aptly argued, the Commission

^{31/} However, not all IXC's have benefitted equally from these immediate, albeit small, reductions. As primarily a reseller that purchases long distance transport from underlying facilities-based carriers, a significant amount of Excel's costs are incurred under fixed-rate contracts. Thus, at least with respect to these contracts, Excel has not realized any decrease in per-minute access charges, yet Excel still must bear the additional costs of PICCs and universal service fund contributions. In sum, contrary to the Commission's expectations, access charge reform has not been

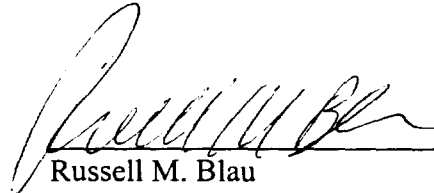
did not go far enough when it raised the X-Factor to a single rate of 6.5%. For instance, AT&T showed that the use of "total company" data, rather than "interstate only" data, produced an understatement of 2-3% in the X-Factor.^{32/} Excel expects AT&T and other parties to refresh the Commission's record on this deficiency and on other deficiencies in the current X-Factor. If the Commission refuses to prescribe cost-based access rates, it should at least correct these deficiencies and substantially increase the X-Factor.

Conclusion

For the foregoing reasons, Excel urges the Commission to take prompt, prescriptive action that will establish access charges at forward-looking, cost-based levels.

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revenue neutral for many IXCs. In many cases, it has increased Excel's costs.

^{32/} Petition of AT&T Corp. for Partial Reconsideration of the Commission's X-Factor Order, 3-12, CC Dockets 94-1, 96-262 (filed July 11, 1997).

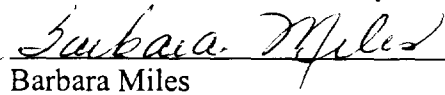
Certificate of Service

I, Barbara Miles, certify that I have this 26th day of October, 1998, served copies of the Comments of Excel Telecommunications, Inc. via hand delivery on the parties listed below.

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